ORIGINAL

LOUISIANA ATTORNEY DISCIPLINARY

IN RE KEN DOHRE

16-DB-010

RULING OF THE LOUISIANA ATTORNEY DISCIPLINARY BOARD

INTRODUCTION

This disciplinary action, consisting of one count, follows what we now know to have been the wrongful conviction of Michael Williams for second degree murder twenty years ago. The only evidence linking Williams to the murder was the testimony of Christopher Landry, who completely recanted his testimony in 2009. The Respondent, Ken Dohre, was the prosecutor in the case, which was prosecuted and tried from 1996 to 1997.[1] After investigating the complaint made by Williams' Innocence Project attorney,[2] the Office of Disciplinary Counsel ("ODC") charged the Respondent with violating Rule 3.3(a)(4) of the Rules of Professional Conduct due to his failure to disclose exculpatory evidence to the trial court following the witness's differing testimony at trial, and Rule 3.8(d) due to his failure to timely disclose the grand jury testimony to the defense prior to trial.[3] Although the hearing committee found misconduct and recommended that Respondent be suspended for a year and a day, the Board finds that the facts do not establish

[1] Respondent was admitted to practice in Louisiana on April 27, 1990. His Louisiana Bar Roll Number is 19906. Respondent is currently eligible to practice.

[2] The ODC initially sought to dismiss the complaint, however, on May 20, 2015, a divided Louisiana Supreme Court remanded the matter for further investigation. ODC Exhibit 3. After concluding its investigation, the ODC filed formal charges.

[3] In 1997, Rule 3.3(a)(4) stated: "A lawyer shall not knowingly … offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures" and Rule 3.8(d) stated: "The prosecutor in a criminal case shall … make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal…."

a violation of the charged Rules in effect in 1996/1997 by clear and convincing evidence. Accordingly, the Board orders that the formal charges be dismissed.

BACKGROUND INFORMATION

The complaint originates out of a 1996/97 Jefferson Parish prosecution of Michael Williams on a second-degree murder charge in the death of Michelle Gallagher. Christopher Landry reported seeing Mr. Williams in the company of the victim shortly before her body was discovered on River Road, in Waggaman, Louisiana, on the night of March 6, 1996. Mr. Landry provided a description of the events he claimed to have witnessed on several occasions during the investigation of the crime and the prosecution of Mr. Williams. Pertinent to this matter are three pre-trial accounts provided by Mr. Landry, as well as his trial testimony.[4] At issue in these disciplinary proceedings is an alleged inconsistency in Mr. Landry's grand jury testimony and his trial testimony relative to his description of what he saw Mr. Williams remove from the vehicle: the victim's body or "something".

I. Criminal Pre-Trial Proceedings and Trial

Mr. Landry provided three pre-trial accounts that are relevant to this matter. These include the statement he provided to police on March 21, 1996 ("statement"), his grand jury testimony, and his testimony at a Motion to Suppress hearing on March 7, 1997. At the Motion to Suppress hearing, after Mr. Landry had testified as to what he saw on the evening of the crime, defense counsel reminded the court that he had made a written request for any *Brady* statements.[5] Judge Susan Chehardy, who presided over the matter, and who served as trier of fact at the trial, acknowledged the request and confirmed that defense counsel was requesting an

[4] We now know that all accounts provided by Mr. Landry were false.
[5] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963).

in camera inspection of the prosecutor's file.[6] In this matter, the parties stipulated and the committee independently found that Judge Chehardy conducted that inspection and that the prosecutor's file contained Landry's statement and his grand jury testimony.[7] Following the inspection, Judge Chehardy required no additional production, although no formal protective order was issued. Mr. Landry's three pre-trial accounts are as follows:

1. **Statement of March 21, 1996 to Police**[8]

Landry told detectives that he saw Williams turn off of River Road onto George Street and drive "about three or four car lengths" on to George Street before stopping his car. At that point, according to Mr. Landry, Mr. Williams stopped his car and exited his vehicle. The statement continues:

> A: He open[ed] the door, he walked around, opened his door and he picked her up out the car he stood her up she fell down . . .
> Q: And he got her out of the car, right?
> A: He picked her up out the car and stood her up on her feet and when he let her go she just fell down.

The detective later asked:

> Q: Is it possible that he dumped her on the River Rd. and not on George St.?
> A: It could be possible.
> Q: Cause from, you're looking straight at? (sic)
> A: I was looking straight at them and it was dark.[9]

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[6] ODC Exhibit 7, pp. 36-37.

[7] Hearing Committee Report, p. 3. The factual stipulations of the parties must be given effect. *In reTorrey*, 2010-0837 (La. 10/19/10), 48 So.3d 1028. According to the ODC, it "interviewed (through her counsel) the trial judge, Susan Chehardy. Judge Chehardy acknowledged that because of the passage of some twenty years, she has no specific recollection of conducting an *in camera* review; however, based on her review of the transcripts, she 'believes that she did conduct the *in camera* inspection, and that the prosecution's disclosure issues were addressed and resolved off the record.'" *See*, ODC's Pre-hearing Memorandum. *See also*, ODC Exhibit 4, the Dec. 17, 2013 sworn statement of Respondent, pp. 16-18, in which he confirms that his entire file, including the grand jury transcript was produced to the judge. In addition, the colloquy between the judge and counsel at trial indicates that the *in camera* inspection took place and that the court found no additional disclosure was required. ODC Exh. 8, pp. 5-8.

[8] ODC Exhibit 11, pp. 520-523.

[9] The ODC conceded that the exact location that the body was dumped was not material.

He continued:

Q: Walk. Get out of his car, walk around to take her out of the car?
A: Take her out of the car.
Q: And she falls down?
A: And she falls down. He gets back in his car and come on.
Q: And then Mike dumped her in the street?
A: Right.

2. Grand Jury Testimony

An excerpt of Landry's grand jury testimony was recited in the June 1, 2011 letter of the District Attorney of the Twenty-Fourth Judicial District addressed to Williams' Innocence Project attorney and made "pursuant the District Attorney's obligations under *Brady*:"[10] This letter is the only evidence in the record that contains any part of the grand jury testimony provided by Mr. Landry. It was penned fourteen years after the trial and two years after Landry had recanted his testimony.[11]

> . . . And I went and walked to the train tracks and I seen Michael [Williams] coming up to the River Road and stopped the car, got up, walked around and took something out and let it go and it fell to the ground. And when he started coming toward me I laid down on the train tracks and he came on around.
> Q: Did you find out what it was that he took out the car?
> A: No.
> Q.: (sic) I didn't find out until the next morning.
>
> ****
>
> THE JURY:
>
> When you say that you hid between the train tracks and you seen him throw something out of the car, did you have any idea what he might have taken out of the car?
> THE WITNESS:
> I had no idea.

[10] ODC Exhibit 6. Respondent was not the prosecutor who handled the case before the grand jury. Another Assistant District Attorney, Marion Edwards, handled the case at that time. ODC Exhibit 4, pp. 14-15. It is notable that the grand jury indicted Williams based on this testimony.
[11] Landry recanted in 2009. *See*, ODC Exhibit 9.

3. Motion to Suppress Hearing, March 7, 1997

Respondent questioned Landry:

> Q. Now, hold on one second. At any point did you see the victim exit the car that she was in with Michael Williams?
> A. The only time I seen the victim when she exited the car when they pulled on River Road and stopped, the driver got out, walked around to the passenger side door, opened it up and helped the person out. When he left the person go, she fell to the ground, he walked back around, got in the car and drove back off.
> Q. Okay and that's what you saw?
> A. That's what I saw.

Following the *in camera* inspection, Judge Chehardy required no additional production, although no formal protective order was issued, and the contents of the State's file were not disclosed to the defense.

II. Trial

In July of 1997, a two-day non-jury trial was held before Judge Chehardy. Landry testified as a prosecution witness. Under direct examination by Respondent, he testified as follows:

> A: . . . The car stopped right before it got back to George Street, he stopped, got out the car, walked around, opened the passenger door. When he opened the passenger, the door, he raised her up and when he stood her up and let her go she dropped like a sack of potatoes . . . .[12]

The questioning continued:

> Q. And you told the police officer what you saw?
> A. That's all I could do.
> Q. You haven't changed your story any time since then?
> A. No.

Under cross-examination by Mr. Hill:

> Q. Okay. And you saw him stop the car with the driver's side to you
> A. He stopped the car right there on the side of the street, got out, he walked around the front of it—

[12] ODC Exhibit 8, p. 257.

Q. Right.
A. --opened the passenger door, reach in, got something out, stood it up, let it go, it all.
Q. Well, that's not what you said earlier. Did you actually see him lift a person out of the car?
A. Yes.
Q. Did you see that?
A. It was a person laying down on the ground after he left.
Q. That's not my question. Did you see him take a person out of the car?
A. Yes, sir.
Q. You could see that from where you were? You could see it through the car?
A. No, you could see it when he stood her up.
Q. You could see her on the other [side] of the car when he stood her up?
A. Yes, the car, she's taller than his car.
Q. From where you were?
A. Yes sir.[13]

Following the trial, Judge Chehardy found Williams guilty as charged and sentenced him to life imprisonment.

III. Post-Conviction Proceedings

Fourteen years subsequent to the conviction, in 2011, Mr. Paul Killebrew of the Louisiana Innocence Project, successfully undertook the post-conviction representation of Mr. Williams. As part of that representation, he obtained an affidavit from Landry in which Landry recanted his trial testimony and admitted that his testimony was entirely false. Landry claimed that he fabricated the entire account to avoid scrutiny as a possible suspect. As a result of the post-conviction investigation, Killebrew obtained the agreement of the Jefferson Parish District Attorney not to re-try Mr. Williams, who was thereafter released from prison.[14]

Following that, Killebrew filed a disciplinary complaint dated December 10, 2012,

[13] ODC Exhibit 8, pp. 114-115.
[14] Hearing Transcript, p. 15-16. Complainant testified that after Landry recanted, he obtained the Jefferson Parish District Attorney's office agreement to the release of Williams. He further testified that he was aware that Williams was represented in civil litigation against the Jefferson Parish Sheriff's Office and the District Attorney's Office and that the case settled. Hearing Transcript, pp.16-17. *See also*, Supplemental Joint Exhibit 2(a), submitted subsequent to the hearing (February 1, 2013 correspondence regarding the civil proceedings) and Minute Entry admitting same.

asserting that Respondent engaged in multiple instances of prosecutorial misconduct by misleading the court and failing to make constitutionally-required disclosures of exculpatory evidence. Specifically, Killebrew stated the grand jury testimony was inconsistent with the trial testimony and should have been produced pursuant to *Brady* and Rule 3.8(d). Further, Respondent should have known the trial testimony was false because it was inconsistent with the grand jury testimony, and Respondent elicited false testimony by having Landry agree that he never changed his story in violation of Rule 3.3(a)(4).

PROCEDURAL HISTORY

After investigating the complaint, the ODC charged Respondent with failing to disclose Landry's grand jury testimony, which ODC alleges varied materially from the testimony Landry gave at trial.[15] In failing to disclose the testimony to the court and the defense, the ODC asserted that Respondent violated Rules 3.3(a)(4) and 3.8(d).

The formal charges read, in pertinent part:

> In connection with his duties and responsibilities as a prosecutor in Jefferson Parish, Respondent, Ken Dohre, was tasked with the prosecution of the case of *State of Louisiana v. Michael Williams* No. 96-2599, 24th JDC (Jefferson). The case was later tried in July, 1997 before Judge Susan Chehardy and the defendant was found guilty.
>
> During the investigation, the state's only purported eyewitness, Christopher Landry, gave testimony to a Jefferson Parish grand jury which varied materially from his later testimony offered at trial. The evidence at issue related to the observations of the witness as to the defendant's transporting and dumping of the decedent victim, Michelle Gallagher's body, after the homicide. The Jefferson Parish district attorney later designated the grand jury testimony of Christopher Landry on this point as exculpatory evidence required to be disclosed under the United States Supreme Court case of *Brady v. Maryland.* The witness's testimony was contained in Respondent's case file prior to the commencement of trial in July 1997.
>
> By his acts and omissions, the Respondent has knowingly violated Rules of Professional Conduct 3.3(a)(4) by failing to disclose the evidence to the trial court following the witness's differing testimony at trial, and the Respondent has

[15] Respondent was not charged with failing to produce the March 21, 1996 statement provided to police.

> knowingly violated Rule [3.8(d)] by failing to timely disclose the grand jury testimony to defense counsel prior to trial.

The formal charges were filed on February 4, 2016. Respondent answered the charges on March 7, 2016. The hearing was held on November 15, 2016. The report of the hearing committee ("committee") was issued on March 29, 2017.[16] Finding misconduct, the committee recommended that Respondent be suspended for a year and a day. Respondent filed objections to the committee's report on May 30, 2017, with an accompanying brief. The ODC filed its Board Brief on June 14, 2017. Oral argument before Panel "B" was held on June 29, 2017.[17] Deputy Disciplinary Counsel Robert S. Kennedy, Jr., appeared on behalf of the ODC. Respondent appeared with counsel, Basile J. Uddo.

Subsequent to oral argument, a decision was rendered by the Louisiana Supreme Court in *In re Seastrunk*, 2017-0178 (10/18/2017); --So.3d--. In that case, a prosecutor was charged with a violation of Rule 3.8(d). In dismissing the charges against the prosecutor, the Court held that the disclosure obligations found in Rule 3.8(d) are not broader than, but are coextensive with disclosure obligations under *Brady.* Both the ODC and Respondent filed supplemental briefs recognizing that the opinion bears on the issue of whether Respondent violated Rule 3.8(d). In addition, the parties indicated that the opinion appears to require that a "considered judicial finding" that the evidence at issue is *Brady* material is required for a finding of a Rule 3.8(d) violation. The ODC admits that there is no such judicial finding in the instant matter.[18]

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[16] The committee was comprised of Leu Anne Greco (Chair), John H. Smith (Lawyer Member) and Kingsley B. Garrison (Public Member).

[17] Panel "B" was comprised of Melissa L. Theriot (Chair), Pamela W Carter (Lawyer Member) and Evans C. Spiceland (Public Member).

[18] *See*, Supplemental and Amending Brief of the office of Disciplinary Counsel, filed 10/27/2017 and Respondent's Supplemental Brief, filed 11/03/2017.

HEARING COMMITTEE REPORT

In its report, the committee listed the evidence it had considered and recited its factual findings, which are generally in accord with those provided in the Background Information section above. The committee rejected the arguments put forth by the Respondent and determined that he had violated Rules 3.3(a)(3) (Candor Toward the Tribunal) and 3.8(d) (Special Responsibilities of a Prosecutor) by knowingly offering evidence he knew to be false and failing to timely disclose to the defense all evidence or information known to him that he knew or reasonably should have known tended to negate the guilt of the accused.[19]

To arrive at its conclusions, the committee considered the 2011 correspondence of the District Attorney and stated that there could be little dispute as to the nature of the grand jury testimony, presumably finding it to be *Brady* material, requiring disclosure under the constitutional standard.[20] The committee then took into consideration the impact of the *in camera* inspection on Respondent's disclosure obligations. It discussed the balancing that was required relative to disclosure of *Brady* information versus protection of secret grand jury testimony, as described in *State v. Hampton*, 686 So.2d 1021, 1024 (La. App. 4th Cir. 1996), writ denied, 695 So. 2d 986 (La. 1997). The committee found material inconsistencies in Landry's version of events relative to *where* he saw Mr. Williams stop his vehicle and *what* he saw Mr. Williams remove from the vehicle.[21] The committee determined that the court's *in camera* inspection relieved Respondent of his duty to disclose the grand jury testimony prior to trial.

[19] In discussing Rule violations, the committee first addressed Rule 3.3(a)(1) which provides: a lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Although Respondent was not charged with violating this Rule, the committee considered it and found "no evidence that Respondent violated Rule 3.3(a)(1). Hearing Committee Report p. 8.
[20] Hearing Committee Report, p. 10.
[21] Hearing Committee Report, p. 13.

However, when the witness testified at trial, his testimony was inconsistent with the grand jury testimony, and the Respondent should have disclosed the inconsistent grand jury testimony.

Relative to the charged Rule 3.3(a)(4) violation, the committee concluded that a "reasonable attorney under like circumstances would and should recognize the falsity of the testimony." Because Respondent elicited the inconsistent testimony during his trial examination of the witness and failed to correct the testimony or disclose the exculpatory material, the committee concluded that he violated Rule 3.3(a)(4).

As to Rule 3.8(d), the committee determined that Respondent knew or should have known that the grand jury testimony and/or statement tended to "negate the guilt of the accused," and there was no protective order relieving Respondent of his obligation to disclose the grand jury testimony to the defense, therefore, Respondent violated Rule 3.8(d).[22]

Regarding the sanction to be imposed, the committee found Respondent knowingly violated duties to Mr. Williams, opposing counsel, the legal system, the public, and the profession and caused actual harm, noting that Mr. Williams was wrongfully convicted and spent years in prison.[23] As an aggravating factor, the committee pointed to Respondent's extensive experience as a prosecutor.[24] As mitigating factors, the committee found no prior disciplinary history and a cooperative attitude toward the disciplinary proceedings, noting that the events occurred nearly twenty years ago, and there have been no other disciplinary complaints against Respondent.

[22] Hearing Committee Report, p. 16.
[23] Mr. Williams was convicted in 1997. He was released in 2011 (14 years).
[24] Although Respondent has served as a prosecutor for much of his twenty-seven-year legal career, at the time of the events under consideration, he had been admitted only seven years.

After discussing the *ABA Standards for Imposing Lawyer Sanctions*, the committee determined that ABA Standard 6.12 applies, indicating a baseline sanction of suspension. It further relied on *In re Jordan*, 2004-2397 (La. 6/29/05); 913 So. 2d 775, in which the Court imposed a three-month fully-deferred suspension on a prosecutor who failed to disclose clearly exculpatory evidence in violation of Rule 3.8(d). Given the extent of the harm, i.e., that Mr. Williams was wrongfully convicted and spent years in prison, the committee recommended suspension for a year and a day.

ANALYSIS OF THE RECORD BEFORE THE BOARD

I. Standard of Review

The powers and duties of the Disciplinary Board are defined in §2 of Louisiana Supreme Court Rule XIX. Rule XIX, §2(G)(2)(a) states that the Board is "to perform appellate review functions, consisting of review of the findings of fact, conclusions of law, and recommendations of hearing committees with respect to formal charges … and petitions for reinstatement, and prepare and forward to the court its own findings, if any, and recommendations." Inasmuch as the Board is serving in an appellate capacity, the standard of review applied to findings of fact is that of "manifest error." *Arceneaux v. Domingue*, 365 So. 2d 1330 (La. 1978); *Rosell v. ESCO*, 549 So. 2d 840 (La. 1989). The Board conducts a *de novo* review of the hearing committee's application of the Rules of Professional Conduct. *In re Hill*, 90-DB-004, Recommendation of the Louisiana Attorney Disciplinary Board (1/22/92).

A. The Manifest Error Inquiry

As a preliminary matter, it is important to address certain evidentiary findings of the committee. The salient facts are not disputed by the parties; however, the committee appears to have improperly taken into consideration certain documents and what the ODC admitted were

immaterial inconsistencies in Mr. Landry's account of the events in reaching its legal conclusions. The committee found "as a matter of fact" that Mr. Landry's statement was relevant to the "committee's and Court's determination of this matter".[25] In particular, the statement was cited by the committee for inconsistencies in the witness' description of what he saw Mr. Williams deposit on the side of the road, and the exact location that the body was dumped (River Road versus George Street near River Road). In addition, the committee made mention of the "Rights of Arrestee Form" and the statement of a witness, Lori Ramsey, in its report.[26] It is not clear what weight the committee may have assigned to these evidentiary items in reaching its legal conclusions.

Respondent filed an objection to the committee's consideration of Landry's statement, and possible consideration of the "Rights of Arrestee Form" and the Ramsey statement in concluding that Respondent violated the Rules.[27] The objection is well founded. Respondent was only charged with failing to disclose the grand jury testimony to defense counsel and the court. He was not charged with failing to disclose the statement, "Rights of Arrestee Form" or Ramsey statement. Moreover, the ODC agreed that the documents were improperly considered and conceded that any inconsistencies related to the location the body was dumped were minor and not material.[28]

The Board finds, under *In re Ruffalo*, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed.2d 117

[25] Hearing Committee Report, p. 8.
[26] Proffers 4 and 5.
[27] In taking note of "other evidence" referenced by the complainant including the "Rights of Arrestee or Suspect" form signed by Mr. Landry, which indicated that Mr. Landry was under investigation for second degree murder, the committee commented that the form could have been used by the defense to impeach Mr. Landry's motivations, but the form was not disclosed to the defense. The committee also noted that a witness named Lori Ramsey indicated that she saw the murder victim hitchhiking on River Road minutes before other motorists found her body, but she was not identified as a witness, nor was her statement disclosed to the defense. As with Mr. Landry's statement, Respondent was not charged with a failure to produce this information. Both the form and a transcript of Ms. Ramsey's recorded statement were proffered. Proffers 4 and 5.
[28] *See*, ODC's Brief to the Disciplinary Board, pp. 3-5.

(1968), that procedural due process demands that Respondent only be held accountable for the charged misconduct. To the extent the committee assigned any weight to the failure of Respondent to disclose the three documents and any inconsistencies in Landry's description of the exact location that the body was dumped in reaching its conclusion that the Respondent violated the Rules of Professional Conduct, it did so in error.

B. *De Novo* Review

In this case, the Board is asked to review in hindsight the conduct of a young prosecutor that occurred twenty years ago and to find that he acted unethically when he did not disclose the grand jury testimony of a key witness to the defense after the witness testified in an allegedly materially inconsistent manner at trial. This alleged failure occurred after the trial judge, who eventually tried the case, conducted an *in camera* inspection of the prosecutor's file, which contained the grand jury testimony, and determined that no further disclosures were required.

Review of this case has presented unique challenges not only with respect to the committee's inappropriate consideration of certain facts, but more importantly, relative to the proper application and interpretation of the ethical Rules to conduct that occurred in 1996/97. This review takes place after Mr. Landry completely recanted his testimony in 2009, admitting he "made it all up", and after the Jefferson Parish District Attorney's office issued correspondence, on June 1, 2011, "pursuant to *Brady v. Maryland*," quoting Mr. Landry's grand jury testimony. In addition, the consideration comes after the Court's recent decision in *Seastrunk, supra,* which the parties agree has bearing on the issue of whether Respondent has violated Rule 3.8(d).

Considering all of the above, the Board finds a lack of clear and convincing proof that Respondent violated his ethical obligations under the Rules of Professional Conduct and it therefore dismisses the charges.

1. Rule 3.3(a)(4) (Candor Toward the Tribunal)

At the time of the conduct in question, Rule 3.3(a)(4) (Candor Toward the Tribunal) provided:

> A lawyer shall not knowingly … (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

The Board disagrees with the committee's conclusion that Respondent engaged in knowing misconduct under this Rule. The record does not establish that Respondent, with the knowledge that Mr. Landry's testimony was false, nevertheless elicited or failed to correct the witness's false and material testimony.

The committee appears to have determined that a reasonable attorney under like circumstances should have recognized that the trial testimony was false because it was different from the grand jury testimony. Though actual knowledge can be inferred from the circumstances, the Board finds no evidence to establish that Respondent actually knew the witness' trial testimony was false. Rather, Respondent testified that he believed the witness' account had been consistent from the start in all material ways.[29] It was argued that Respondent knew the witness had provided inconsistent versions of the events and elicited false testimony when he asked Mr. Landry if he had ever changed his story. Respondent specifically denied this, and explained that he asked this question to emphasize that although Mr. Landry had been

[29] ODC Exhibit 5, pp. 36-38.

questioned numerous times by the police at his house, and even though he did not want to be known in the neighborhood as "a rat", he consistently testified that Mr. Williams committed the crime.[30] The record lacks any evidence to controvert this testimony and there is simply no clear and convincing proof that Respondent had actual knowledge that the testimony was false.

In addition to requiring knowing conduct, the Rule requires that the Respondent knowingly submit false evidence that is material. At the time of trial, Respondent knew that he had tendered his entire file, which included Landry's statement and the grand jury testimony, to the Judge for her *in camera* review pursuant defense counsel's request for *Brady* material. This was proper procedure, which required the balancing of the competing interests of *Brady* and the secrecy of the grand jury proceedings by the trial court. Disclosure would have been in the sound discretion of the trial judge.[31] The result of Judge Chehardy's *in camera* inspection was that she found no *Brady* material—no material inconsistency—that required disclosure.

When Judge Chehardy conducted her *in camera* inspection, she had before her both versions of the events as described by Mr. Landry: that Mr. Williams dropped "something" and that he dropped "a person". The ODC charged Respondent under Rule 3.3(a)(4) with failing to disclose Landry's inconsistent trial testimony to the trial court, but Landry's testimony at trial was the same as his statement and the testimony he provided at the Motion to Suppress hearing, which had previously been considered by the judge.[32] The judge's conclusion following the *in camera* inspection could only serve to reinforce the Respondent's belief that Landry's testimony at trial was not materially inconsistent with his grand jury testimony.

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[30] ODC Exhibit 5, p. 38.
[31] *State v. Hampton*, 686 So. 1021, 1024 (La. App. 4th Cir. 1996), writ denied 695 So.2d 986 (La. 1997).
[32] The committee recognized the same conflict existed between the Motion to Suppress and the grand jury testimony but nevertheless found the grand jury testimony did not become exculpatory until the witness again testified inconsistently at trial. Hearing Committee Report, p. 11.

Finally, the commentary to the *ABA Model Rules of Professional Conduct* indicates that Rule 3.3(a)(4) is "premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence."[33] In the instant case, Respondent tendered his entire file to Judge Chehardy, prior to trial. Judge Chehardy was the trier of fact at Mr. Williams' trial. There is simply no evidence in these disciplinary proceedings which would support a finding that Respondent misled Judge Chehardy in any way.

Under the circumstances presented in this case, and for the reasons set forth above, the Board finds insufficient proof that Respondent failed in his ethical obligation to be candid with the tribunal in violation of Rule 3.3(a)(4).

2. Rule 3.8(d) (Special Responsibilities of a Prosecutor)

Respondent was also charged with a violation of Rule 3.8(d). Considering the record and evidence, the Board finds that a violation of this Rule has not been established.

> In its report, the committee cited the current version of the Rule:
>
> The prosecutor in a criminal case shall make timely disclosure to the defense of all evidence *known to the prosecutor that the prosecutor knows, or reasonably should know,* either tends to negate the guilt of the accused or mitigates the offense … except when the prosecutor is relieved of this responsibility by a protective order of the tribunal. (Emphasis added.)
>
> At the time of the of the conduct in question, Rule 3.8(d) provided:
>
> The prosecutor in a criminal case shall … make timely disclosure to the defense of all evidence or information *known to the prosecutor* that tends to negate the guilt of the accused … except when the prosecutor is relieved of this responsibility by a protective order of the tribunal. (Emphasis added.) [34]

[33] ABA Model Rules of Professional Conduct, Rule 3.3, Comment 5.
[34] The parties stipulated that no formal protective order was issued.

Rather than applying the standard set forth in the version of Rule 3.8(d) as it existed at the time of the alleged misconduct, the committee applied the current version of Rule 3.8(d). The current version of the Rule makes it a violation for a prosecutor to fail to disclose evidence "known to the prosecutor that the prosecutor knows, *or reasonably should know* . . . tends to negate the guilt of the accused . . . ." (Emphasis added.)[35] As previously discussed relative to Rule 3.3(a)(4), the record fails to support a finding that Respondent had actual knowledge that Landry's accounts were false, inconsistent or otherwise tended to negate the guilt of the accused. Based on the plain language of the Rule as it existed in 1996/97, the Board finds a lack of sufficient proof to establish a violation of Rule 3.8(d).

The committee also applied a more expansive definition of the type of evidence requiring disclosure under Rule 3.8(d) than that required under *Brady.* The committee determined that Rule 3.8(d) "only requires that the undisclosed material 'tend to negate' Mr. Williams' guilt," and that the inconsistencies in Mr. Landry's grand jury testimony and statement meet the threshold requirement for disclosure under the Rule, thus applying a more expansive interpretation of disclosure obligations under the ethical rules than those imposed under *Brady.*[36] At the time the committee made its decision, it did not have the benefit of the Court's analysis in *Seastrunk* in which the Court specifically rejected the argument that the ethical rule imposes a broader disclosure obligation upon prosecutors and found that disclosure obligations imposed under the current version of Rule 3.8(d) and under *Brady* are coextensive.

With the guidance provided by the Court in *In re Jordan*, 04-2397 (La. 6/29/05), 913 So.2d 775, and more recently *Seastrunk*, the Board must consider whether the testimony in

[35] Rule 3.8(d), first adopted in 1986, and effective January 1, 1987, was amended in 2006 to add the phrase "or reasonably should know" after "make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows."
[36] Hearing Committee Report, p. 13.

question constituted *Brady* information. In discussing constitutional disclosure obligations under *Brady*, the *Seastrunk* Court referred to language in that case which provides that suppression of evidence favorable to the accused violates due process where the evidence is material to guilt irrespective of the good faith or bad faith of the prosecution. Concerning materiality, it cited *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481, (1985), recognizing that evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."

Applying the reasoning in *Bagley* to the current case, the Board finds that the record does not support a finding that there was a reasonable probability that the result would have been different had the grand jury testimony been disclosed to the defense. Here, Judge Chehardy, not a jury, served as fact-finder. The evidence shows that at the time of the alleged misconduct, the trial judge was privy to the grand jury testimony of Mr. Landry, as well as his pre-trial statement. She had presided over the Motion to Suppress hearing at which the witness testified. At trial, Mr. Williams was represented by counsel, who questioned Mr. Landry thoroughly and specifically regarding what he saw Mr. Williams drop: a body or "something". There is no evidence to suggest that the judge did anything other than weigh the testimony, including any inconsistencies in Mr. Landry's version of the events, and finding them to be immaterial, concluded that conviction was appropriate. Under the circumstances in this case, a reasonable probability that the result would have been different had the grand jury testimony been disclosed has not been established.

Further support for the Board's dismissal of this charge can be found in *Jordan, supra,* the sole Louisiana case in which the Court disciplined a lawyer for failing to disclose *Brady* evidence. In *Jordan*, the only witness to positively identify the defendant told police in a

statement that she was not wearing contacts or glasses at the time of the murder and relative to identifying the defendant, she was "coming at this at a disadvantage." The witness later told Mr. Jordan that she was nearsighted and only needed her glasses for nighttime driving but not to see at close distances. Mr. Jordan unilaterally concluded that the prior statement was not material exculpatory evidence and did not produce the statement to defense counsel. Although the conviction was reversed on other grounds, the Court commented that the prior statement was "obviously" exculpatory and "clearly" should have been produced. It is notable that the Court in *Seastrunk* found it significant that at the time the *Jordan* ethical misconduct complaint was considered, the Court in the underlying criminal matter had already made a determination that the evidence in question was obviously exculpatory and clearly should have been produced. The ODC admits that there is no such judicial finding in the instant matter that the grand jury testimony constitutes *Brady* evidence.[37]

Moreover, unlike the prosecutor in *Jordan*, Respondent did not unilaterally decide to withhold "obviously" exculpatory evidence that "clearly" should have been disclosed. Rather, the record shows that Respondent cooperated with the defense request for *Brady* material, and provided his entire file to the trial judge for her *in camera* review. The record does not establish that the grand jury testimony was "obviously" exculpatory and "clearly" should have been disclosed. The record shows that Respondent's belief that the witness' pre-trial accounts and trial testimony were materially consistent was shared by the trial judge, who did not find that

[37] *See*, Supplemental and Amending Brief of the office of Disciplinary Counsel, filed October 27, 2017. *See also*, Respondent's Supplemental Brief, filed November 3, 2017. The June 1, 2011 letter by the Jefferson Parish District Attorney, which recited the grand jury testimony, was "made pursuant to the District Attorney's obligations under *Brady*." However, it is not clear from the record what the facts and circumstances surrounding the issuance letter may have been. Moreover, this letter was written with the benefit of fourteen years' hindsight and after Mr. Landry had recanted his testimony.

disclosures were necessary after her *in camera* review for *Brady* material and who, after hearing the trial testimony and weighing the evidence, convicted the defendant.

Considering the facts and circumstances that Respondent faced, at the time he faced them, the Board finds a lack of clear and convincing proof that Respondent violated the Rules as charged. Accordingly, it finds legal error in the committee's conclusions, and finds that dismissal of the formal charges is appropriate.

CONCLUSION

The Board declines to adopt the committee's report and recommendation and, finding that clear and convincing proof of misconduct has not been established, dismisses the formal charges.

RULING

The Board orders that the formal charges filed against Ken John Dohre be dismissed. The costs and expenses of this proceeding are to be borne by the Disciplinary Board.

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FOR THE ADJUDICATIVE COMMITTEE